GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Tom and Debbie Mertens
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	Tom and Debbie Mertens
Project:	Fourplex Apartment Building
Date of this Advisory Opinion:	August 23, 2011
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a property appeal an administrative decision after the period to file an appeal has expired?

When may a City claim that a decision on a property's nonconforming use status has already been made by a board of adjustment?

Summary of Advisory Opinion

The property owners cannot appeal an Administrative Decision after the 30-day appeal period has passed. Both the City's ordinances and the Utah Code provide for a 30 day appeal period, and after that period expires, appeals may not be considered.

The City cannot rely on earlier decisions concerning variance applications to claim that its Board of Adjustment determined whether a property was eligible for nonconforming use status. It is by no means clear that those earlier decisions even considered whether the property could qualify as a nonconforming use, and any ambiguity must be construed against the City. The property owners are entitled to a full evaluation of all evidence, and a decision on whether their property qualifies for nonconforming use status.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from Tom and Debbie Mertens on May 23, 2011. A copy of that request was sent via certified mail to Christine Meeker, City Recorder of Salt Lake City. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on June 6, 2011.

Evidence

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion from Tom & Debbie Mertens, filed May 23, 2011 with the Office of the Property Rights Ombudsman, including attachments.
2. Response from Salt Lake City, submitted by Paul C. Nielsen Senior City Attorney, received on June 6, 2011.
3. Portions of minutes from the Salt Lake City Board of Adjustment meetings on November 1, 1982, May 13, 1985, and June 10, 1985.
4. Sections from the Salt Lake City Municipal Code.

Background

Tom and Debbie Mertens (the "Mertens") own property located at the corner of Kensington Avenue (1520 South) and 900 East in Salt Lake City (the "Property"). The Property includes a building with four residential units. The Mertens have rented the units consistently since they purchased the building, and believe that the building has had four units for over fifty years.[1] The former owner stated that the building had four units as long as he owned it, and the Salt Lake County Assessor classifies the Property as "Multiple Housing, 3-4 units." The Mertens state that

[1] The Mertens state that the building was constructed in 1940, and originally had two units and two small garages. A short time later, the garages were converted into living units, and have been rented out continually since then. The Mertens have obtained several affidavits from residents of the neighborhood and former tenants of the building, who agree that the building has had four rental units for at least 40 to 50 years. The units evidently have separate street numbers. One unit's address is on 900 East, and the others are on Kensington Avenue. The two lower units (the former garages) have driveways immediately in front of the entry ways. Parking for the other two units is on one side of the building.

their decision to purchase the Property was primarily based on the rental income from four units, which would generate enough money to pay off the mortgage and provide a modest profit. The Mertens state that they have expended effort and expense to maintain the property, including landscaping. The building appears to be similar in appearance to other structures in the immediate area.[2]

In the 1980s, the Property's former owners applied for variances on two occasions. The variance requests related to parking on the Property. In 1982, the Property's owner requested a variance from the City's zoning ordinance, to allow parking on a driveway in the existing front yard, which was prohibited under the City's zoning ordinance. That request was denied on November 1, 1982. The minutes of the Board of Adjustment meeting indicate that the zoning for the Property was R-4 (which allowed four units). The variance request was denied, because there was ample space for parking in the rear of the property, and the board found no special circumstances or unreasonable hardship which warranted a variance.

In 1985, the Property's owner submitted two variance applications, each requesting reduction of a required setback in order to construct covered porches or carports over the front of the lower units. The Board of Adjustment's minutes show that the requests were considered in May and June of 1985. Again, the minutes state that the zoning for the Property was R-4. The Board granted the variance in May, with the understanding that the building was a duplex. However, the City realized that the building had four units, and so a new application was considered in June, which included a request that the fourplex be "legalized" with a reduced number of parking spaces in the front yard. The Board reversed its previous decision, and denied the variance, noting that there was insufficient parking, and that two units had been added to the building without a building permit.[3] The minutes show that the 1985 ordinances would have required the fourplex to have at least eight parking spaces (two per unit). At most, the property only had room for five, located in the rear yard.

As it was in 1982, the issue considered by the Board of Adjustment was a variance of parking and setback requirements, not a discussion of whether the building was a nonconforming use. The minutes show no discussion of when the building was converted to a fourplex, and whether all four units had been continuously offered for rent.[4] The prior owners of the Property did not appeal the variance denials.[5]

In February of 2011, the City's Community and Economic Development Department inspected the Property, and issued a "Certificate of Present Condition," which stated that "Salt Lake City recognizes the building as duplex only; not a fourplex. Lower units are not legal." The

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[2] The building is slightly larger than most of the single-family homes in the area, but is comparable in overall appearance.

[3] There is apparently no record of a building permit for the building, or for the renovation of the two lower units.

[4] The Board of Adjustment minutes consistently indicate that the zoning for the Property was R-4. Part of the reason the June 1985 variance request was denied was because the property owner was unwilling to comply with a zoning ordinance that prohibited parking in front yards.

[5] Despite the Board's actions in 1982 and 1985, the Property continued to be used as a fouplex, with parking in the front yard. The Mertens have presented evidence that the units have been continuously rented since before 1980.

Certificate was accompanied by letter explaining that the City recorded the Certificate with the Salt Lake County Recorder, and that "[t]his certificate may make it difficult to sell your property."[6]

Following the February 22 letter, the Mertens submitted a written request that the Certificate of Present Condition be removed from the Property. On March 17, the City's Department of Community Development responded, and explained that the City had reviewed available information about the property, and concluded that in 1985, "the Board of Adjustment . . . already ruled on the use of the property, . . . [and] we are unable to administratively consider your claim that a fourplex use at 1520 South 900 East has been grandfathered." The letter did state that the City would consider an application for a "Special Exception Unit Legalization." The Mertens were told to submit the application to the Board of Adjustment. The letter concluded with an explanation that the ruling found therein may be appealed to the Board of Adjustment within 30 days of the decision.

The Mertens did not appeal the decision made in the March 17 letter, but evidently submitted an application for a special exception.[7] The City notes that the Mertens cannot challenge the 1982 or 1985 decisions denying the variance requests, and that they also cannot challenge the decision made in the March 17, 2011 letter.

Analysis

I. The Mertens Cannot Appeal the March 17 Administrative Decision Regarding the 1985 Board of Adjustment Decision.

The Mertens are not able to appeal the March 17th Administrative Decision, because more than 30 days have passed since the decision was made. The City correctly notes that its ordinances, along with the Utah Code, provide for a thirty-day appeal period.[8] The March 17th letter explained this clearly. The Mertens did not appeal the decision, and the time for appeal has passed.

The March 17th letter was the City's response to the Mertens' request for a review of the Certificate of Present Condition. Any further appeal needed to follow the procedures and time frames established by the City's ordinances and the Utah Code. Since there was no appeal filed within the 30 days after March 17, the Mertens cannot pursue an appeal now. Likewise, the 1982 and 1985 Board of Adjustment decisions may not be appealed by the Mertens.[9]

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[6] The letter, dated February 22, 2011, also stated that a "Certificate of Correction and Compliance" would be filed if the problems were corrected (*i.e.,* discontinuation of the lower rental units). It was not clear what prompted the City to investigate the Property.

[7] As of the date of this Opinion, that application had not been considered.

[8] In extraordinary circumstances, it may be just and equitable to allow an appeal after the 30-day period has expired. However, the Mertens are not claiming that they should be allowed an appeal due to such extraordinary circumstances. Therefore, this Opinion will not evaluate any potential exemptions to the rule.

[9] However, as discussed below, neither the 1982 or 1985 decisions amount to a final determination of whether the Mertens' property qualifies for nonconforming use status. Likewise, the March 17 Administrative Decision also

II. The Fourplexes Eligibility for Nonconforming Use Status Has not Been Determined.

There is still a question of whether the fourplex qualifies for nonconforming use status, because that issue has not been definitively evaluated. A property qualifies for nonconforming use status if it was established when the use was permitted, and has been maintained continuously even though current zoning ordinances prohibit the use. *See* UTAH CODE ANN. § 10-9a-103(32) (Definition of Nonconforming Use). A nonconforming use is allowed to continue as long as it is maintained by the property owner, and is thus a type of vested property right *See id.*, § 10-9a-511(1)(a).[10] Vested property rights cannot be taken away without clear authority and justification. *See Stucker v. Summit County*, 870 P.2d 283, 288 (Utah Ct. App. 1994).[11]

The Mertens claim that they are entitled to nonconforming use status, and they have presented evidence which appears to support their claim. The City, on the other hand, maintains that the Board of Adjustment determined that the fourplex was not a nonconforming use in the 1980s. However, the minutes of the hearings before the board show that there was no discussion of whether the fourplex qualified for nonconforming use status. The hearings instead considered applications for variances of setback and parking regulations, a completely different analysis than nonconforming use eligibility. In fact, the minutes of the hearings indicate that a fourplex was allowed under the zoning regulations in place.[12]

The City cannot rely upon the earlier decisions from the Board of Adjustment to prohibit the Mertens' nonconforming use claim. As has been discussed, there is little reason to conclude that the board's decisions in the 1980s had anything to do with whether the fourplex could be granted nonconforming use status. Since it is not clear that there has been a full evaluation of nonconforming use status, the question must remain open. "[T]o the extent there is ambiguity in the case file . . . it is well established that any ambiguity will be construed against the City." *Vial v. Provo City*, 2009 UT App 122, ¶ 18, 210 P.3d 947, 952 (citation omitted).

The Mertens are entitled to a full evaluation of all the evidence which pertains to whether their fourplex qualifies for nonconforming use status. If they can show that four units were legally established when permitted by the City's zoning ordinance, and that the four units have been continuously rented (or offered for rental) since the ordinance change which reduced the number of allowed units, they are entitled to nonconforming use status. It is enough to show that the use was established when allowed. That is all that is required by state law. Exact compliance with

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does not grant or deny legal nonconforming use status to the Mertens. The fact that the Mertens cannot appeal the March 17th letter does not finalize the question of whether or not the Mertens' use is grandfathered.

[10] The right to continue a nonconforming use may be lost if the use is discontinued or is phased out as part of an amortization plan. UTAH CODE ANN. § 10-9a-511.

[11] In *Stucker*, the Utah Court of Appeals reviewed whether a land owner could claim vested rights to develop property. The Court looked at several opinions from other states which support the conclusion that a property owner gains the vested right to continue a given use when a permit is issued, or if there is substantial expense in reliance on zoning ordinances. *See also* UTAH CODE ANN. § 10-9a-511(1) (An established nonconforming use may be continued).

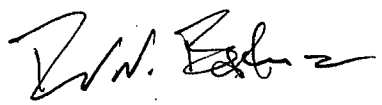
[12] The zoning ordinances in place in 1982 and 1985 have not been definitively established. The minutes of the board of adjustment hearings seems to indicate that a fourplex could have been allowed, if the parking issues had been resolved.

regulations governing the use is not necessary, and noncompliance will not necessarily disqualify the property for nonconforming use status. *See Vial*, 2009 UT App 122, ¶ 16, 210 P.3d at 951-52.

Conclusion

The Mertens cannot appeal the Administration Decision issued in March of 2011, because more than 30 days have passed. Both the City's ordinances and the Utah Code provide a 30-day appeal period. Once that period has expired, appeals are no longer available.

However, the City's reliance on earlier Board of Adjustment decisions is misplaced, and the City cannot assert that the property does not qualify for nonconforming use status. Because the right to continue a nonconforming use is a vested property right, it cannot be taken away without clear authority and justification. The Board of Adjustment hearings from the 1980s considered variance applications, and did not evaluate whether the property was eligible for nonconforming use status. The Mertens are therefore entitled to a full evaluation of all the evidence and a decision based on that evidence on whether the fourplex qualifies as a nonconforming use.



Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Christine Meeker, City Recorder
Salt Lake City Corporation
451 South State, #415
Salt Lake City, Utah 84111

On this 24th Day of August, 2011, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

Cynthia W. Nelson
Office of the Property Rights Ombudsman